No. 93-744

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In The

Supreme Court of the United States

October Term, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

GREENWICH COLLIERIES,

Respondent.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

MAHER TERMINALS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT PASQUALINA SANTORO IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the longstanding policy of the Department of Labor and courts that doubtful factual issues should be resolved in favor of the injured employee and his family with respect to claims under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefit Act, in controversion of those statutes or of the Administrative Procedure Act?

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STATEMENT OF THE CASE

This case arose out of claims under the Black Lung Benefit Act (hereinafter BLBA) 30 U.S.C. 901, et seq. and the Longshore and Harbor Workers' Compensation Act (hereinafter LHWC) 33 U.S.C. 901 et seq.

The decisions of the United States Court of Appeals for the Third Circuit attempt to invalidate a longstanding and pervasive policy, both by the courts and the Department of Labor that doubtful factual issues should be resolved in favor of the injured employee and his family, a principle explicitly engrafted onto the BLBA.

The lower court's utilization of Section 7(c) (5 U.S.C. 556(d)) of the Administrative Procedure Act, 5 U.S.C. 551 et seq. (hereinafter APA) to expound a rigid common-law preponderance of the evidence rule also raises a question as to Congress' intent in enacting that statute: whether there was intended a hammerlock on the authority of the agencies and courts of a rigid standard of evidence or whether there was intended a broad and flexible approach, leaving discretion to the agency and courts to regulate the issues such as quantum of evidence and burden of proof in accordance with the particular provisions and policies of the involved statute.

As set forth generally, in the Director's Petition, the common element in both cases was the administrative law judge's utilizing the principle that doubtful factual issues should be resolved in favor of the injured worker and his family to break an evidentiary deadlock. In the case of *Ondecko v. Greenwich Collieries* there was a conflict in the interpretation of multiple x-rays (27-30a) and of testimony (38-39a, 44a).[1] The administrative law judge felt that the opinion of Dr. Dandrea, who had been treating the claimant for some 20 years (38-39a, 44a), created

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[1] Reference is the appendix of the director's Petition for Writ of Certiorari. References marked "JA" as references to the joint appendix.

true doubt as against the employer's evidence and concluded that the claimant had proved pneumoconiosis in resulting permanent total disability (41a), a determination upheld by the Benefits Review Board (20a). In the matter of *Santoro v. Maher Terminals* there was a likewise sharp dispute in medical testimony. While it was accepted that the employee had an injury to the neck (JA26) there was an issue as to whether the injury caused his death due to complications from paralysis in the presence of a rare and slow growing malignancy that had apparently existed for many years (JA39, JA40, JA50). There was uncontradicted testimony of a worsening of the claimant's condition after the initial injury (JA37-39, JA45). The employer's medical witness, Dr. Derby, who had never examined the employee during his lifetime disputed that he injured his neck (JA42, JA49), disputed the testimony of the claimant's attending physician as to the appearance of the tumor, although this witness had never seen it (JA46) and stated that the malignancy had by coincidence escalated to cause paralysis and death (JA48, JA49, JA50).

After a meticulous review of all of the evidence it was determined that the record, contrary to the assertion of the employer's consultant, Dr. Derby, showed an unbroken history of neck pain (JA45, JA53) concluded that there was conflicting probative evidence and that the doubt should be resolved in favor of the claimant (JA50). The petition for reconsideration was denied (JA34-35) and the Benefits Review Board affirmed the decision (JA25-33).

Both cases appeared for oral argument before the United States Court of Appeals for the Third Circuit in January 12, 1993 and in both cases the Court reversed the decisions of the Board and remanded the cases back to the respective administrative law judges to consider if the claimants had proved their cases by a preponderance of the evidence, with a direction that if the evidence was

again found to be in equipoise the respective employers must prevail (16a, JA24).[2]

In neither case did the Third Circuit inquire into the existence of substantial evidence to support the conclusion. In the *Greenwich Collieries* case, the court concluded that the widow had to prove her case by a preponderance of the evidence and came to this conclusion in reliance on the department's own regulation at 20 CFR 718.202 and certain language in this court's holding in *Mullin's Coal Co. v. Director, OWCP*, 484 U.S. 135 (1986). Although the Administrative Procedure Act was generally discussed the court specifically deferred determining if Section 7(c) was controlling (11a, Note 4).

In *Maher Terminals v. Director*, OWCP, (JA8-24), lacking the rationalization of Department of Labor regulations and the *Mullins* case, the Third Circuit voided the principle of resolving true doubt in favor of the claimant by a strained interpretation of 7(c) of the APA (5 U.S.C. 556(d)). The court concluded that the widow was required to prove her case by a preponderance of the evidence and the long line of circuit court cases affirming the principle of true doubt was casually dismissed as not taking account of the APA (JA22-23). In fact, the court held that the general liberal purpose of the statute was adequately served by the easily rebuttable presumptions of the statutes (11a, JA22).

Petitions for rehearing in both cases were denied (47a-50a).

Petitions for writ of certiorari were filed in behalf of Pasqualina Santoro (93-474) with respect to the *Maher* case and the Director, Office of Workers' Compensation

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[2] Absent a specific statement by the Administrative Law Judge in either case that the evidence was in equipoise (i.e. exactly at most debatable respondent Santoro accepts neither the BRB nor the Third Circuit's interpretation that the evidence was found to be in equipoise nor that the so-called "true doubt" principle is limited to such a situation.

Programs with respect to both cases (93-744). The former petition is pending, the latter petition was granted.

SUMMARY OF ARGUMENT

The principle that doubtful issues of facts should be resolved in favor of the injured employee and his family has long been a fixture of interpretation of the Longshore and Harbor Workers' Compensation Act, as being consistent with congressional intent, the purpose of the Act, and its exemption from the formality of common-law rules. The identical policy and principle of "true doubt" was engrafted onto the BLBA in 1972, along with certain other provisions of the Longshore Act.

Therefore, the proposition advanced by the court below that the claimant under both Acts, must demonstrate his case by a preponderance of the evidence is a novel one.

Further, the lower court's utilization of Section 7(c) as the basis of a requirement of preponderance of the evidence absent Congressional exception, is significant in that the requirement would be spread throughout the multitude of Federal administrative proceedings subject to the APA. This holding seriously misconstrues Congress' intention in enacting the APA.

It was the intent of the Congress to ensure that there existed a minimal procedure across the Federal administrative system. Congressional concern was particularly directed at agency action against an individual, whether person or business entity, (as opposed to controversies between private parties), wherein the agency made its determination based upon a policy or prejudice as opposed to "reliable, probable and substantial" evidence. Further, while Congress did intend that the evidence should be measured against a standard of proof or persuasion, it was not Congress' intention to establish a unitary standard for all cases or all stages of proceeding. Congress had no intent to alter the authority of the agencies and the courts to allocate the burden of persuasion,

based upon a wide variety of statutes, Congressional intent, social policies, and the complexities of individual facts.

In interpreting the APA, the courts, including this Court have uniformly interpreted Section 7(c) as allocating only the burden of production of evidence, not that of ultimate persuasion. This Court has also recognized, however, that Section 7(c) can be used to protect the agency from imposition of a burden of proof of greater than preponderance of the evidence, *Steadman v. SEC*, 450 U.S. 91 (1981). It was not Congress' intention that the APA should vitiate the long standing policy of the Longshore Act that doubtful factual issues should be resolved in favor of the injured worker or his family. Fact-finding in the context of the so-called "true doubt" rule fully comports with the APA because the resulting decision is based upon a reasoned interpretation of all the evidence in the entire record. In the context of case under the LHWC or the BLBA no more is required.

The pervasive legislative, judicial and social policy is that workers' compensation statutes in general and the LHWC and BLBA, in particular, are subject to a liberal interpretation and fact-finders under both Acts have uniformly applied the principle that doubtful factual issues should be resolved in favor of the injured employee and his family. In the case of Longshore claims there is a long judicial history supporting this policy and the courts have logically applied the same principle to the BLBA. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1986); *Freeman United Coal Mining Co. v. OWCP*, 988 F.2d 706, rehearing den. 999 F.2d 991 (7th Cir. 1993).

A basic characteristic of proceedings under these workers' compensation statutes is that the department is not "bound by common-law or statutory rules of evidence or by technical or formal rules of procedures . . . " This exception applies to "investigation or inquiry or conducting a hearing". 33 U.S.C. 923(a). While the principle of true doubt could well be analyzed in terms of

technical rules of evidence, it may well be that it can be as well understood as a function of the informality of procedure not only in hearings but in all stages of the claim process, the purpose of which is the prompt and inexpensive determination of rights of the parties. The principle that doubtful factual issues should be resolved in favor of the claimant is not merely a proposition of evidence but one that is intimately linked with the statutory purpose and implementation of the Acts. The principle of doubt in no way violates the substantial rights of the employer because in a disputed case the evidence is still examined in an even handed and fair manner and both the claimant and the employer are subjected to identical standards of proof and persuasion. The principle of true doubt is only a deadlock breaking device and in no sense a substitute for evidence.

As such it is a recognized adjunct of the Acts and one that is needed to right the economic imbalance between the injured employee and employer.

ARGUMENT

POINT I

THE PRINCIPLE THAT DOUBTFUL FACTUAL ISSUES SHOULD BE RESOLVED IN FAVOR OF THE INJURED EMPLOYEE AND HIS FAMILY DOES NOT CONTRAVENE THE ADMINISTRATIVE PROCEDURE ACT

The opinions of the Third Circuit, stripped to essentials, hold that in all administrative proceedings subject to the APA the proponent of an order (and always the claimant in a workers' compensation case) at all stages of the proceeding bears the burden of ultimate persuasion and must prove his or her case by a preponderance of the evidence and only Congress can exempt from this rule, the agencies themselves and the courts being stripped of their power to determine standards of proof and burdens

of persuasion based upon often very delicate policy considerations and interpretation of the individual statute. In the view of the circuit court a manufacturer striving to keep an insecticide on the market, (*Environmental Defense Fund v. EPA*, 584 F.2d 498 (1st Cir. 1976) cert. denied 434 U.S. 925 (1977); a stock broker accused of fraud (*Steadman v. SEC*, cited above); an employer accused of anti-union animus (*NLRB v. Transportation Management*, 462 U.S. 393 (1983) and the workers' compensation claimant all come before a hearing officer with identical burdens of proof which are maintained throughout the proceeding. It is claimed that Congress intended to deprive the courts of their traditional function to determine the questions of burdens of persuasion and standards of proof based on application of widely varying statutes and policies applied by expert fact-finders. If permitted to stand, this holding would have a devastating impact on the federal administrative system in general and the Workers' Compensation system in particular.

More particularly, it is contrary to the clear reading of the statute, congressional intent, and the holdings of this Court interpreting the APA.

A. The Plain Reading of the Relevant Statutes

Two sentences of Section 7(c) of the APA (5 U.S.C. 556(d)) are at issue.

The first sentence reads:

> Except as provided by statute, the proponent of a rule or order has the burden of proof.

The courts have uniformly interpreted that sentence as applying only to the burden of going forward with evidence, not burden of proof or persuasion, although the cases do not base their holdings solely on that sentence, *NLRB v. Transportation Management*, 462 U.S. 393 (1983);

Environmental Defense Fund v. EPA, 584 F.2d 498 (1st Cir. 1976) cert. denied 434 U.S. 925 (1977); *Bosner v. U.S. Department of Agriculture*, 754 F.2d 804 (9th Cir. 1984); *Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972).

What is significant about this sentence is that it is the only sentence that requires legislative exception. Cong. Rec. 3/25/46, *Letter of Attorney General Tom Clark and Appendix to Revised Committee Report of 10/5/45*, quoted, U.S. Congress, *Legislative History, Administrative Procedure Act*, 1944-1946, U.S. Printing Office, 1947 (hereinafter *History*), at page 411. The term proponent is not identified. In workers' compensation proceedings under the Acts, far from clear who the proponent is. Referral of a case to the administrative law judge is made by the District Director, all parties submit pre-hearing statements and the ALJ addresses the issues raised in the pre-hearing statement, 20 CFR 702.316, 702.317, 702.338. The ALJ is to determine "the rights of the parties," 20 CFR 702.339. These provisions are incorporated into the BLBA (30 U.S.C. 932(a)). In a formal hearing under the relevant Acts each party is a proponent of an order in their respective interest.[3]

The third sentence of that subdivision requires that no sanction, rule, or order be issued except "on the whole record" and "in accordance with the reliable, probative, and substantial evidence." The plain reading of that sentence reveals two things: 1. Congress did not specify which party or if any party has the burden of producing

[3] For example, a considerable number of loss of hearing claims have been filed against respondent Maher Terminals and in many of these cases Maher Terminals has filed a pre-hearing statement to request a formal hearing before the claimant has done so and in some cases the claimant has not requested a formal hearing at all. It is Maher who is requesting an order.

the requisite evidence but describes the type of evidence required and 2. does not state (unlike the first sentence) who has the burden of producing that or any evidence. It is particularly to be noted that Congress could have used one of the standard labels of the burden of proof, such as preponderance of the evidence but did not do so.

Also of relevance is Section 10(e) of the APA (5 U.S.C. 706(2)(e)) providing for judicial review, inter alia, of orders unsupported by substantial evidence upon the administrative record where the agency is authorized by statute to hold hearings. The Section is of relevance because of the use of the term "substantial evidence". That the term "substantial" means the same in both sections was strongly suggested by Congress. With respect to Section 7(c) it was stated:

> The proof must be substantial, as provided in this section and also in Section 10(e) where the term 'substantial evidence' is discussed later in this report.

H.R. Rep. 1980 79th Cong. 2nd Sess. quoted *History* page 27.

B. The Intent of Congress in Enacting Section 7(c) and the APA Generally

The Administrative Procedure Act was passed in 1946 after 10 years of consideration and deliberation, SR 752 Cong. 1st Sess., page 1. The legislative history of that Act makes clear that if the statutory purpose, generally, was as follows:

1. To ensure some minimal procedural safeguards across all federal agencies, without changing the procedures of those federal agencies with mature administrative process; 2. a primary purpose of Section 7(c) was to protect the individual or business from determinations of federal agencies not based upon evidence of the requisite

type; 3. In 10(e) to ensure judicial review and to eliminate the scintilla of evidence review standard that had been used in some cases and to replace it with a more common substantial evidence standard, Letter of Attorney General Tom Clark and Appendix, quoted *History*, pages 229-231.

It was decidedly not the intent of Congress to enact a single burden of persuasion, imposed across the entire federal administrative system and exempt same from agency or judicial interpretation, as the Third Circuit appears to believe. Congress had a good reason for leaving the language of Section 7(c) vague. Had Congress intended such a dramatic change, it would be reasonable to expect that it would have so stated clearly, unequivocally, and a number of times over the lengthy period this legislation was considered.

Keeping in mind that many of the hearings under the APA involved the rights of an individual or business as against government agency, Congress was concerned about the arbitrary rejection of evidence. For example:

> Whenever the burden of proof is upon private parties to show right or entitlement to privileges, permits, benefits, or statutory exceptions, their competent evidence (other than opinions or conclusions) to that effect shall be presumed true unless discredited or contradicted by other competent evidence.

H.R. Rep. 339, 79th Cong. quoted *History*, page 143.

and

> For example, credible and credited evidence submitted by the applicant for license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence.

SR 752, Senate Committee on a Judiciary, 11/19/45, quoted *History*, page 208.

Thus:

> It [Section 12] provides that requirements of evidence procedure are to apply equally to agencies and private persons, except as otherwise provided by law.

Cong. Rec. 3/12/46 (Senate), Senator McCarran, Chairman of Senate Judiciary Committee, quoted *History*, page 324.

> Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it.

Id. page 321.

The Third Circuit placed heavy reliance on an incomplete quotation from Congressman Walter, Chairman of the House Judiciary Committee (JA20) – almost the only time the word "preponderance" turned up in all these years of congressional deliberations. The quotation in context is:

> The first and second sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a prima facia and substantial case, he will prevail unless his evidence is discredited or rebutted. In any event, the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgement on the whole record in accordance with the proofs adduced. The proof must be substantial, as provided in this section and also in section 10(e) where the term "substantial evidence" is discussed later in this report.

H.R. Rep. 1980, 79th Cong. 2nd Sess., quoted *History*, page 269.

Congressman Walter did not give us his definition of "preponderance" and did not say whether he was talking about a strict common law preponderance of the evidence standard.

An earlier comment by Congressman Walter clarify what he meant:

> The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity . . . under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference.

Cong. Rec. 5/24/46 (House), quoted *History* page 365.

Senator McCarran in a parallel report to the Senate did not use the term preponderance of the evidence but stated:

> There are no real rules or probity and reliability even in courts of law, but there are certain standards in principles – usually apply tacitly and resting mainly upon common sense – which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings.

Senate Judiciary Committee, SR 752, 11/19/45, quoted *History*, page 208.

In other words, the standard of evidence is fairness and practicality, whatever may be the label put upon it.

Congressional intention also makes clear that the third sentence of 7(c) was deliberately left vague as to who had the burden of proof. In other words, whatever may be the standard of evidence used by the agency, that same standard must be applied to both parties. Thus:

> Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponent of the denial or relief must sustain such denial by that kind of evidence.

H.R. Rep. 180, 79th Cong. 2nd Sess., quoted *History*, p. 15.

The Senate used nearly identical language, SR 752 79th Cong. 1st Sess., quoted *History*, page 208.

Thus, the provisions of Section 7(c) are meant as a guide to the agencies, subject to judicial review under 10(e) of the Act (Cong. Rec., House, 3/25/46, Letter of Attorney General, quoted *History*, page 22).

In summary, it was Congress' intention not to precisely define evidentiary standards but to ensure that such standards existed, conformed to basic concepts of fairness, and that agency determinations were based upon that evidence.

Thus wholly missing is any suggestion that it was the intent of Congress to remove the previously recognized authority of the agencies, or absent agency action, the courts to regulate matters such as burden of proof.

An earlier proposed version of 7(c) makes clear the intended flexibility of the burden of evidence and persuasion:

> (h) RULES OF EVIDENCE – Immaterial, irrelevant, and unduly repetitions evidence shall be excluded from the record of any hearing and, as nearly as may be, the basic principles of

> relevancy, materiality, and probative force as recognized in Federal judicial proceedings of an equitable nature shall govern the proof of all questions of fact, EXCEPT [emphasis supplied] that such principles shall be (1) broadly interpreted in such manner as to make effective the adjudicative powers of Administrative agencies, (2) shall be adapted to the legislative policy under which adjudications are made, and (3) shall assure that as a practical matter testimony of reasonable probative value will not be excluded as to any pertinent fact.

H.R. Rep. 130, 79th Cong., 1st Sess., quoted *History*, p. 15.

Finally, it is worthy of note that the Longshore Act has, since its inception in 1927 (3/24/27, Chapter C. 509 1.44 Stat. 1424) a mature administrative process of the adjudication of claims (33 U.S.C. 919), for review of compensation orders (33 U.S.C. 921) and procedure before the Deputy Commissioner (33 U.S.C. 923) the latter dispersing with formal rules of evidence in procedure in favor of a determination of the "substantial rights of the parties".

It was not Congress' intent that the APA depart from the type of procedural and evidentiary standards incorporated into the Longshore Act but was primarily declarative of them, including the Longshore Act standard of review, *Crowell v. Benson*, 285 U.S. 22 (1931). The APA was also declaratory of prior law that the agencies were not bound by formal rules of evidence, e.g. *Interstate Commerce Commissions v. Board*, 194 U.S. 25 (1904); *Opp v. Administrator*, 312 U.S. 126, Mod. 312 U.S. 657 (1941); see Cong. Rec. 3/12/46 (Senate), Senator McCarran, quoted *History*, page 320; *Letter of Attorney General*, cited above, quoted *History*, page 412; *Natural Vermont Yankee Power Corp. v. Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

Nowhere in the congressional proceedings is there any evidence that standards of procedure under the Act,

including burden of proof, were a subject of congressional concern, even though claims under the Longshore Act were by that time a significant portion of federal administrative adjudication.

When cases under the Act were made subject to the APA, Congress had no concern about either the procedural or evidentiary standards of the Act.

> It is the committee's belief that the administration of the Longshoremens' and Harbor Workers' Compensation Act has suffered by virtue of the failure to keep separate the functions of Administering the program and sitting in judgement on the hearings.

H.R. Rep. 92-1441, 92nd Cong. 2d Sess. 1972, quoted U.S.C.C.A., pg. 4708.

C. This Third Circuit Has Misread Both the Plain Language of Section 7(c) of the APA and this Court's Interpretation of Same

In the case of *Maher Terminals v. Santoro*, (and more vaguely in the matter of *Greenwich Collieries v. Ondecko*), the Third Circuit misread the plain language of Section 7(c) in that it attempted to pull out of the third sentence of 7(c) a strict common law preponderance of the evidence rule and require legislative exception thereto (JA24) despite the fact that it is only the first sentence of Section 7(c), determining burden of going forward with evidence, that requires such legislative exception. For reasons above noted, the court quoted in isolation the legislative history using the terminology "preponderance" (JA20) and endeavored to rationalize out of existence the same congressional report stating that both parties had the same burden of proof (JA18-19). The court's reasoning was that Congress could not have meant this because "an order in favor of the claimant will

issue that is not supported by preponderance of the evidence, . . . " (JA19). This, of course, begs the question since that is the very point at issue.

In *Maher*, the lower court endeavored to reconcile *NLRB v. Transportation Management*, 462 U.S. 393 (1983) with *Steadman v. SEC*, 450 U.S. 91 (1981) by endeavoring to read *NLRB* out of existence. In *Greenwich Collieries v. Ondecko*, the court relied on an unusual reading of *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987).

At first blush, there appeared to be a conflict in this Court's interpretation of Section 7(c) in *Steadman v. SEC*, cited above, and *NLRB v. Transportation Management*, cited above. However, the two cases can be harmonized by placing the cases in the context of their particular holdings and in the context of other cases of this court.

In *Transportation Management* this Court held unequivocally that the agency had the authority to shift the burden of persuasion, by a preponderance of the evidence, to the employer on the validity of reasons for termination after a showing of anti-union animus. The court was specific that Section 7(c) controlled only the burden of producing evidence. Certainly the court was interpreting the first sentence of 7(c) but it is equally clear that the language of the third sentence thereof was not regarded as controlling as to the right of the agency to shift its burden of persuasion in the absence of legislative exception. Further, the court did not derive the preponderance of the evidence standard from Section 7(c) but from the agency's interpretation of its own statute.

The Third Circuit's attempt to distinguish this case by suggesting that there was involved an affirmative defense, begs the question because the employer's burden was denominated as an affirmative offense precisely

because the burden of persuasion was placed on the employer.

In *Steadman v. SEC*, cited above, the agency itself used a preponderance of the evidence standard in proceedings against the broker who argued that a standard of "clear and convincing" evidence should be utilized due to the harsh results (loss of livelihood) resulting from the order.

This Court undertook a close analysis of Section 7(c) and concluded that the agency's compliance with Section 7(c) protected the agency from imposition of a stricter standard of proof. The holding would conflict with *Transportation Management* if 7(c) were used to override the agency's selection of a standard of proof. What is significant about *Steadman* is that it, like *Transportation Management*, upheld the authority of the agency to determine standards of persuasion within the confines of the APA.

The Court's interpretation in *Steadman* centered around the phrase in the third sentence of 7(c) "in accordance with the reliable, probative and substantial evidence" and concluded:

> Nor is there any suggestion in the legislative history that a standard of proof HIGHER [emphasis supplied] than a preponderance of the evidence was ever contemplated, much less intended.

450 U.S. 91, 102-103.

The core of the *Steadman* analysis is that the third sentence of 7(c) requires a weighing of the evidence against the standard. No argument is had with this proposition nor is there any argument with the proposition that absent congressional, agency or court action, the default standard of proof could be the preponderance of the evidence. The term "default" is used because 7(c)

does not contain the terminology "preponderance of the evidence" nor was that section intended to change existing rules respecting burden of proof. The wording of Section 7(c) is more compatible with the requirements that the evidence should be balanced against some standard meeting the minimum requirements of Section 7(c) as well as a review requirements of 10(e), assumed to be the preponderance of the evidence standard only when that standard is specifically used by the agency, when there is silence on the subject or where, as in *Steadman*, there is an endeavor to impose a stricter standard. There is no language in *Steadman* limiting the authority of the agency or the courts respectively to alter the burden of persuasion in certain circumstances and at certain stages of the proceeding. However, *Transportation Management* specifically reaffirms the right of the agency to do so, *NLRB v. Transportation Management*, cited above, 403-405.

It is significant that the court in *Transportation Management* analogized to *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), in which this Court shifted the burden of presumption on an issue in a civil lawsuit, despite the specific statement in rule 301 of the Federal Rules of Evidence (that a presumption "does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast"). *Transportation Management*, appeared to reason that if the very specific language of rule 301 did not prevent this Court from shifting the "customary burden of persuasion in a manner that otherwise would be permissible"

(*Transportation Management*, pg. 403, note 7) then neither should less specific language of Section 7(c).[4]

Also significant is the reference in *Steadman* to Justice Clark's (he being the attorney general at the time of the enactment of the APA) dissent in *Woodby v. INS*, 385 U.S. 276 (1966) in which it was suggested (unsuccessfully against the establishment of a higher standard of proof in a non-APA case) that Section 7(c) and 10(e) of the APA have "traditionally been satisfied when the agency decides on preponderance of the evidence." *Id.* at 289-91, note 1, quoted *Steadman*, 102, note 22, suggesting that both justices were discussing a minimum or "default" standard of proof. The majority in *Woodby* despite statutory language broadly similarly to Section 7(c) (8 U.S.C. 1105(a)(4) and 1252(b)(4)) impose a stricter burden of proof on deportation proceedings stating:

> It is the kind of question which has traditionally been left to the judiciary to answer . . .

Woodby, Id. at 284.

The final significant case is *Mullins Coal Co. v. Director, OWCP*, cited above, which was interpreted by the Third Circuit as independently mandating a standard of preponderance of the evidence in BLBA cases, independently of the APA based on interpretation of Department of Labor regulations (11a, note 4).

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[4] The issue of the presumptions of Section 920 of the Longshore Act is not before this court as the ALJ specifically found the presumption in the *Maher* case to be rebutted (32). However, it should be noted that such findings are typically made on the "bursting bubble" theory of presumption, *DelVecchio v. Bowers*, 296 U.S. 280 (1935). *Mt. Healthy*, and its treatment in *Transportation Management* suggests the possibility that the Department of Labor or the courts, could strengthen the presumption of Section 920 as some circuit courts have attempted to do, e.g. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980).

How the Third Circuit could reason in *Greenwich Collieries* that the Department, independently of the APA, is able to determine the burden of persuasion by regulation in a BLBA case and is not able to do so in a Longshore case is something respondent cannot possibly understand, as the adjudicative provisions of the Longshore Act wholly apply to the BLBA, 30 U.S.C. 932(c).

Equally difficult to understand is how the lower court could extract a preponderance of the evidence standard from the following BLBA regulation:

> The burden of proving a fact alleging connection with any provision of this part shall rest with the party making such allegations.

20 CFR § 718.403 (1992). That regulation is irrelevant to the issue because no one denies that the respective parties are obliged to prove the facts making out their respective position. As is more fully discussed in Point II hereof, the principle of doubt comes into play only in resolving the ultimate inference from the facts already proved. In addition, the language of the regulation "the burden of proving a fact" is not significantly different from the term "burden of proof" contained in Section 7(c) which has been interpreted as the burden of going forward with evidence, i.e. producing the parties evidence to prove the relevant facts, *see NLRB v. Transportation Management* and generally cases cited *supra*.

In any event, the court in *Mullins Coal v. Director OWCP*, cited above was interpreting the "interim presumption" of 20 CFR 203(b), no longer in effect at the time Mr. Ondecko filed his claim, 30 U.S.C. 931, Part C et seq. In that case the Department interpreted its own regulation as requiring proof by a preponderance of the

evidence of one of the qualifying criteria of pneumonoconiosis as its language required consideration of all relevent evidence, 20 CFR 727.203(b).

A close reading of the facts of *Mullins* reveals that the Secretary's interpretation of the regulations actually imposed a heavier burden on the claimant than a general preponderance of the evidence standard. Both the claimant's evidence and conflicting evidence had to be considered and the claimant's evidence preponderate in determining if there was a prima facie case and the presumption arose, *Mullins, Id.* at 158, 160. This standard is stricter than the usual case of presumption wherein the one in whose favor the presumption is created is entitled to prove the facts giving rise to the presumption, independently of contrary evidence, and only then is it determined if the contrary evidence is adequate to rebut the presumption, *see DelVecchio v. Bowers*, cited above, and Federal Rules of Evidence, 301.

Of significance is the fact that this Court upheld the authority of the Secretary to interpret his own regulation and did so independently of the provisions of the APA. Further, assuming arguendo that the APA did impose a general burden of persuasion, then the court could have decided the case without further inquiry. Rather the Court based its holding on the Secretary's interpretation of his regulation. The Court specifically noted the secretary's adherence to the "true doubt rule", although the issue was not applicable to the case, *Mullins, Id.*, 145, note 12.

Nearly contemporaneous with this holding in the instant case the Seventh Circuit, in a case wherein the true doubt rule was at issue, held it not to contravene the APA, *Freeman United Coal Mining Co. v. OWCP*, 988 F.2d 706, *rehearing den.* 999 F.2d 991 (7th Cir. 1993). The Fourth

Circuit affirmed the rule that the "true doubt" principle does not have a property of affirmative evidence and can be used only in the case of doubt only in the mind of the fact-finder, *Grizzle v. Pickinds Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993). An identical finding has been made with respect to the "true doubt" principle under the Longshore Act, *Sprague v. Director, OWCP*, 688 F.2d 826 (1st Cir. 1982).

These cases, read together with congressional intent, indicate that it was not the primary intent of the APA to impose a rigid uniform preponderance of the evidence standard and that, irrespective of whether or not there is a general standard of persuasion applicable, the agencies and courts respectively were not thereby deprived of their traditional authority to allocate burden of persuasion on certain issues and at certain stages of the proceedings.

D. The Utilization of the "True Doubt" Principles by the Administrative Law Judges Herein Does Not Contravene the APA.

Section 7(c) essentially requires that an order or sanction be based upon evidence adduced and upon review of the entire record with provision of judicial review, pursuant to Section 10(e) only to determine if the evidence be "substantial".

These were the standards of Longshore adjudication and review before the passage of the APA, *see generally* 33 U.S.C. 919 and 921, *Crowell v. Benson*, 285 U.S. 22 (1931); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932). After the Longshore Act was made subject to the APA, this review standard was maintained independently.

Therefore, there was no need for Longshore claims to be made subject to the APA at its enactment in 1946 and when they were so subjected to in 1972, Congress' motivation was not any discontent with the adjudicatory process but to prevent the conflict inherent in the Director being both administrator and adjudicator of claims under the Act, H.R. Rep. 92-1441, 92nd Cong. 2nd Sess., quoted U.S.C.C.A., pg. 4708.[5]

The ALJ decisions in both these cases conform to the APA because they are solely based upon a reasoned review of the evidence in the entire record. In *Maher Terminals*, Administrative Law Judge Silverman exhaustively discussed the medical testimony, other medical records, and all the possible inferences arising therefrom (JA37-50). At that point the ALJ notes:

> This record presents the unenviable task of resolving the ultimate issue from conflicting probative evidence. It is an arguable case in which the rule that doubt concerning evidentiary conflict should be resolved in favor of the Claimant is denied applicable.

(JA50). It is to be noted that although there was an expression of doubt, it was not noted that the evidence was absolutely in equipoise. It is further to be noted that the ALJ then undertook a further discussion of the evidence (JA50-55) in which he further discussed the testimony of the claimant's attending physician Dr. Yazden, noting the unbroken history of neck pain and that Dr. Derby's assertion that the condition was not known to be aggravated by trauma was not claimed to be backed up by any statistical studies. Only then did the ALJ note that

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[5] A conflict of interest that still occurs in cases of a claim against the special funds under 908(f) or against a defunct employer or carrier under 918(b).

acceptance of the employer's position that the spontaneous and abrupt escalation of the underlying condition, after existing for many years, was purely fortuitous would be "inconsistent with the purposes in policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant" (JA55).

Congress intended that administrative decisions should be based upon a review of evidence in the record as a whole and Judge Silverman clearly complied with that requirement.

In *Greenwich Collieries,* at first blush one could wish that Administrative Law Judge Rosensweig had provided additional reasoning for her selection of Dr. Dandrea's and Ignacio's opinions over those of the employer's doctors (43a-44a). But one quickly also realizes that it is difficult to wax either eloquent or analytical over a numbing quantity of x-rays and pulmonary function studies that seem the standard mode of defense in Black Lung cases, the theory apparently being that the greater weight of evidence consists of evidence that weighs more. The ALJ was trying to look beyond this multitude of tests to the realities of the situation: that the doctors who best knew Mr. Ondecko, having treating him over a period of years, were the best qualified to judge his condition (38a-39a, 43a-44a). It was concluded:

> I find the fact that the Claimant's treating physician considers him totally disabled to raise true doubt in face of the Employer's expert opinions.

(44a). This conclusion was reached only after an exhaustive review of all exhibits, medical reports, and testimony. (26a-36a).

It cannot be disputed that these decisions are based upon careful review of all the relevant evidence, the

balancing of conflicting evidence, and that the ultimate inference is supported by substantial evidence since in each case the claimant had the benefits of expert medical testimony unequivocally affirming causation. (39a, JA55).

Therefore, if judicial and/or Agency interpretation justify resolving doubtful factual issues in favor of the injured employee and his family (and that clearly is the interpretation of the Department of Labor and every circuit court case but the instant) then nothing in 7(c) or other provision of the Administrative Procedure Act invalidates that determination.

POINT II

THE PRINCIPLE THAT DOUBTFUL FACTUAL ISSUES SHOULD BE RESOLVED IN FAVOR OF THE WORKMEN AND HIS FAMILY COMPORTS WITH THE UNDERLYING PURPOSE, PROCEDURE AND READING OF THE ACTS AND LIES WITHIN THE DISCRETION OF THE FACT-FINDER

The essential difficulty with the Third Circuit's mechanistic interpretation of the APA, LHWC and BLBA, is that it would roll back a 75 year history of administrative adjudication and place the injured employee back into a common-law courtroom required to prove his case by the "material allegations of the complaint" (11a, JA22) by a preponderance of the evidence. (An amended version of the *Maher* decision substitutes the word "claim" for "complaint", see Petition in 93-474 at A14).

This approach wholly misconstrues the statutory and procedural implementation of the respective Acts and workers' compensation statutes in general. The simple undebatable fact is that the compensation claimant is not a common-law plaintiff, the compensation claim process not a lawsuit and the recovery, if any, is not of tort

damages but of benefits Congress has granted the injured employee and his or her family.

The principle of true doubt is not primarily a function of mechanistic rules of evidence or burden of persuasion (itself an expression of policy) but the expression of a longstanding social policy, a principle of interpretation of the Acts and a token of the degree of discretion accorded the Department of Labor in fact-finding of disputed issues.

A. The goal, nature and implementation of the respective Acts.

The non-jurisdictional provisions of the LHWC, extended generally to the BLBA, were lifted bodily, and, in many cases almost verbatim, from the New York Workers' Compensation Law, *Laws of the State of New York L1913 c. 816; L1914 c. 41; L1922 c. 615.*

Congress' intention was to provide to certain maritime employees the type of workers' compensation system that the several states had provided and was required by this court's holding in *Union Pacific Railway v. Jensen*, 244 U.S. 205 (1917).

Rather than "re-invent the wheel", Congress adopted the New York procedural approach broadly and the essential substantive scheme noting:

> The bill follows in the main New York State compensation law, which is considered one of the best due to the fact that it was drafted after the most careful investigation by experts and others . . .

H.R. Rep. 1190 5/13/22, pg. 2, 67th Cong. 2nd Sess.

Congress' intention was no different than that of New York's:

> Workmen's compensation has come to be universally recognized as a necessity in the interest

> of social justice between the employer and employee. It is the modern substitute for the old common-law remedy afforded through actions at law for damages and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness . . .

H.R. Rep. 1769, 1/14/27, pgs. 19-20, 69th Cong. 2nd Sess.

and

> The important principles of compensation are promptness in payment and simplicity in procedures . . .

H.R. Rep. 739, pg. 4, 1/31/22, 67th Cong. 2nd Sess. Like the New York statutes, there were provided benefits (not damages) through a procedural system unknown to the common-law. From today's perspective, its revolutionary nature is difficult fully to appreciate.

At the heart of the entire compensation system in this country there lies a trade off or "bargain". The employee gives up his right of common-law action against the employee, *McKinneys New York Worker's Compensation Law, Section 10;* LHWC 33 U.S.C. 905(a). While the employee can sue a responsible third party a duplication of recovery is prevented, *N.Y.W.C.L. Section 29;* LHWC 33 U.S.C. 933(a). Of course, the maritime employee also has certain maritime remedies, which were further severely restricted by the 1972 amendments, in return for a liberalization of benefits, *see generally* H.R. Rep. 92-1441, 97th Cong. 2nd Sess.

This bargain was best described in an early New York case:

> This Act protects both employee and employer, the former from wasteful suits and extravagant

> verdicts, the latter from the expense, uncertainties and delays of litigation in all cases and from the certainty of defeat if unable to establish a case of actionable negligence. Both Acts [1911 and 1914] are said to have been based on the proposition that the risk of accidental injuries in a hazardous employment should not fall on the injured employee and his dependants who are unable to bear it or to protect themselves against it.

Jensen v. Union Pacific Co., 215 N.Y. 518, 524 (1915) rev'd on other grounds sub. nom. *Union Pacific Railway v. Jensen*, cited above.

What the injured employee and his family obtain in return for giving up these substantial rights is the hopefully prompt payment of wage replacement benefits and in an amount far less than he would have received in "damages" in a suit at law or admiralty (*see generally* 33 U.S.C. 906, 908 and 909) and medical care (907) "payable irrespective of fault as a cause of the injury" 33 U.S.C. 904(b).[6]

The goal of speedy delivery of this lesser benefit, was to be effectuated in a two-fold manner:

1. By the abolition of common-law and statutory rules of evidence and procedure and; 2. The finality of administrative determination as to facts. However these

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[6] Against the claim of respondent *Maher* (Brf. pg. 30), the amount paid to the widow is less than she would have received had her spouse lived. Certainly the BLBA affords the mine owners greater financial protection than would be afforded if their employees had their common-law rights arising out of conditions caused by exposure or deadly mineral dust. This "deal" has not always and necessarily benefitted the employee.

goals necessarily import a principle of liberal interpretation in favor of the employee and his family, as was early recognized. For example:

> All of the provisions of the Act indicate a clear intention that the facts shall be speedily determined by the deputy commissioner to that compensation may be awarded without the delay usually incidents in the courts.

Crowell v. Benson, cited above at 27.

> It is intended that the burden of error shall fall on the employer, who is best able to bear it.

Jensen v. Union Pacific Co., (Court of Appeals case) cited above at 524.

This court further stated:

> Such laws [workers' compensation statutes] operate to relieve persons suffering with such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them.

Baltimore & Philadelphia Steamboat Co. v. Northern, 284 U.S. 408, 414 (1932). Also *see generally Larson*, "The Law of Workmen's Compensation", 1-9 (Section 2.20).

Thus, Congress enacted Section 923(a) exempting the statute from "common-law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act;" the goal not being to determine who prevails but "best ascertain the rights of the parties". (This provision is substantially taken from Section 113 of the New York Workers' Compensation Law). Its purpose was interpreted by the New York courts as protecting the claimant against technicalities, *Ziegler v. P. Cassidy's Sons*, 220 New York 98, 102 (1917); *see also Crowell v. Benson*, quoted above, page 27.

The second essential prong of this statutory scheme is the finality of fact-finding by the deputy commissioner

(also as of 1972 the hearing examiner or administrative law judge, Section 919(a)-(c)), while preserving the right of judicial review and, as of 1972, providing agency review.

This court thus stated this statutory scheme:

> to furnish a prompt continuous, expert and inexpensive method for dealing with a class of questions of facts which are particularly suited to examination and determination by an administrative agency . . .
>
> and
>
> the efficacy of the plan depends upon the finality of the determination of fact.

Crowell v. Benson, cited above, pages 46-47.

Thus, Congress enacted an administrative system having little resemblance to a common-law or admiralty action, see generally 33 U.S.C. 919. There exists an informal conference procedure, see generally 20 CFR 702.101-.319 with resort to a formal hearing before an administrative law judge in the event the district Director is not able to resolve the dispute (see generally 20 CFR 702.331 et seq.) However, it is important to note that the Act contemplates voluntary compliance by the employer or carrier, who is required to file a report of injury (930(a)), voluntarily commence payment of compensation within 14 days or controvert the case and notify the deputy commissioner of his action (914(a)) and pay medical voluntarily (907(a)) (an unappreciated function of the presumptions of Section 920(a) of the Act is administrative convenience: the deputy commissioner is able in uncontested matters to legally take appropriate action without the need of testimony).

Thus, the formal hearing procedure is but one part of the hearing process and not necessarily the major part.

Indeed, it is open to question what percentage of cases are ever contested at all.[7]

This entire statutory scheme (with initial fact-finding until 1972 solely by the deputy commissioner) led to an early and continuing recognition that the Act, like its sister act in New York, was remedial in nature, whose provision should be liberally construed so as to achieve its benevolent purposes, goals aided by informality of procedure and finality of fact-finding, *Petrie v. Onedia Steel Pully Co.*, 215 N.Y. 335 (1915); *National Biscuit Co. v. Fogarty*, 215 N.Y. 20 (1917); *Baltimore & Philadelphia Steamboat Co. v. Northern*, cited above, *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *Voris v. Eikel*, 346 U.S. 328 (1953); *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977).

The purpose of this lengthy recitation is not to urge a principle of blind liberality but to demonstrate the close inter-relationship between Congress' goals in enacting the Act and the principle of liberal interpretation, without which these goals cannot be accomplished. A secondary purpose of this recitation is to highlight that the process herein is not akin to a common-law lawsuit and the parties are not precisely like a personal injury plaintiff and defendant. Once the claimant establishes certain jurisdictional facts, he comes into the compensation process with a strong legislative and judicial policy that he should, if warranted, be compensated. It may well be the introduction of the formal hearing system 919(d) and 20

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[7] The informal aspects of this procedure may be less clear in BLBA cases which, like most occupational disease claims, commence with a filing of a claim by the employee rarely followed by immediate and voluntary payment. Nevertheless, there must be assumed that at least some of these cases are resolved without a formal hearing.

CFR 702.331 et seq. create the appearance of a common-law courtroom, but the reality is otherwise. While the formal hearing process is only a part of the entire compensation claim process, any finding of this court as to burden of proof or persuasion perforce would apply to the entire claim process.

After an earlier unsuccessful effort, the BLBA was incorporated into this statutory scheme in 1972, 30 U.S.C. 932(a). Also specifically incorporated therein was the longstanding principle of liberal interpretation in favor of the employee. The congressional reports pulse with compassion and manifested a determination to compensate:

> miners and the widows and children of miners whose lives and health have been sacrificed in the production of that critical energy source coal.

SR 90-743, 92nd Cong. 2nd Sess. (1972), quoted U.S.C.C.A. pg. 2305, H.R. Rep. 92-460; *Mullins v. Director, OWCP*, cited above. It is obvious that this principle of liberal interpretation was ported directly from the Longshore and Harbor Workers' Compensation Act.

Against this background, the assertion of the court below that this principle of liberal interpretation is adequately served by the limited presumptions of the Act (11a, JA22) is both novel and retrogressive. Assuming this Court's holding in *DelVecchio v. Bowers*, cited above, the presumptions are easily rebuttable by substantial evidence and are of little assistance to the claimant in a litigated case as "its only office is to control the result where there is an entire lack of competent evidence," *DelVecchio v. Bowers*, cited above, at 286.

B. The principle that doubtful factual issues should be resolved in favor of the injured employee and his or her family has been consistently applied to cases under the Act.

There is a perfect symmetry to the proposition that just as doubtful provisions of the statute should be construed in favor of the injured employee and his or her family so too should doubtful factual issues. The Act itself (923(a)) as well as Section 7(c) of the APA are silent as to precise burdens of persuasion. Section 923(a) itself frees the fact-finder of common-law statutory rules of evidence or procedure except as the Act itself provides and accords the fact-finder (be it the ALJ or district director) with exclusive authority to weigh evidence, and make credibility determinations, or draw inferences and draw conclusions. These determinations are not subject to review provided they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. 921(b)(3). That certain of the "true doubt" cases have confused the standard of review with the standard of fact-finding and does not undermine the validity of their conclusions or their consistency.

Thus, the courts from an early date recognized the principle, and stated it broadly, that doubtful factual issues should be resolved in favor of the employee. Many of the cases merely stated this as a general expression of principle or policy e.g. *Southern S.S. Co. v. Norton*, 101 F.2d 825 (3rd Cir. 1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88 (5th Cir. 1990); *Watson v. Golf Stevedoring Co.*, 400 F.2d 649 (5th Cir. 1968). The earliest case required the deputy commissioner, in the absence of contrary evidence, to resolve the undisputed evidence in favor of the

employee, *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932).

Other cases explicitly discussed an emphatically rejected the concept that the Act put the burden on the claimant to prove his case by a preponderance of the evidence. In *F. H. McGraw & Co. v. Lowe*, 145 F.2d 886 (2nd Cir. 1944), the deputy commissioner had put a memo in file expressing uncertainty as to the correctness and justice of his own decision. The court stated:

> It [the memo] shows merely that the hearing officer had entertained doubt and that in resolving that doubt in favor of the claimant had been somewhat influenced by the policy frequently announced by the courts that doubt be resolved in favor of the injured employee or his dependant family.

8 *Id.* at 888. Thus, at an early date it was determined that the rule was used only after review of the relevent evidence and not as a substitute for review of the evidence.

In other cases awards to claimant were upheld on the evidence that, nearly as a matter of law, was not preponderant in the common-law sense because it was barely sufficient to make out a prima facie case. In *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986) and *Mid Gulf Stevedores, Inc. v. Newsome*, 462 F.2d 185 (5th Cir. 1972) (facts at 33 F. Supp. 162(E.D.Y La. 1971) awards of compensation were upheld where the claimant had no conclusive testimony as to medical causation as against contrary testimony emphatically denying causal relationship. Any argument that the rule was grounded in the presumptions of Section 920(a) of the Act was dispelled in *Strachen Shipyards v. Shea*, 406 F.2d 521, 522 (5th Cir. 1969). The basis of the true doubt rule was squarely placed upon Section 923(a)'s abolition of common-law standards, interpreted in light of the policy of the Act.

A significant discussion of the rule is contained in *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968). In that case an award was upheld against a claim of collateral estoppel due to prior unsuccessful litigation by the claimant against the employer. In upholding the award of compensation, the court stated that collateral estoppel effect could not apply because there were differing standards of proof in a court proceeding as against the workers' compensation proceedings and stated:

> The standard before a jury is the preponderance-of-the-evidence test. Although we cannot attach a legal labor to the burden before the Commissioner, the statutory policy, as interpreted by the courts, indicates that it is a less stringent standard of persuasion.

Id. at 188.

C. It is not necessary to put a label on claimant's burden of persuasion in an LHWC or BLBA case.

It is submitted that the 5th Circuit was wise in expressing a reluctance to put a precise label on the parties' burden of persuasion of the fact-finder beyond stating it is less than that of other civil litigants in courts of record.

These cases do not state the principle of true doubt with the precision the Director utilizes: that in the limited circumstance where the evidence is in equipoise; a finding is required in favor of the injured employee, leaving the burden of ultimate persuasion on the employer (Director's petition, i, 15-16, 17).

Certainly, the claimant would have no argument with the Court's adopting the director's interpretation based upon the agency's own interpretation of the relevant Acts, e.g. *Lessar v. C. F. & I. Steel Corp.*, 3 BLR 163, 1-68

(1981) and the agency's general power to shift the burden of persuasion, *NLRB v. Transportation Management*, cited above, an authority explicitly reserved by the Department based upon the above case, 29 CFR 18.301 (Rules of Evidence, U.S.D.L., Reporters Note).

However, it is believed by this respondent that adoption of the Director's precise position is not required to preserve either a more broad principle of doubt or the validity of the ALJ decisions herein.

The concern here is two-fold. First, it appears that the parties are becoming engaged in discussion and juggling of technical terms, perhaps having little relation to the administrative process, the very sort of thing Section 923(a) of the Act was intended to eliminate from the decision making process to be replaced by a "sound practical judgement" by "an administrative agency especially assigned to that task", *Crowell v. Benson*, cited above at 47. If it is desirable to avoid introducing into the compensation system the technicalities of civil rules of evidence and procedure, now is the time to do so.

Secondly, there is a serious question as to whether there is a need to put a label such as "preponderance of the evidence" on to the fact-finding process of cases under the Act. While it is true that the substantial evidence rule may have prevented the courts from having to specify a "label" it is not coincidental that in the 60 plus year history of the Longshore Act there has been felt no need to do so and yet the administration procedures of the Act have functioned quite satisfactorily, not requiring any significant modification of the standards of fact finding or review since the inception of the statute. This is not to say that such labels may be more useful in the case of Federal agencies vis a vis individual rights e.g. *NLRB v. Transportation Management*, cited above and *Steadman v.*

SEC, cited above and Point I hereof – as opposed to litigation between private parties.

As the cases and authorities make clear, labels such as "preponderance of the evidence" can be of considerable significance as a matter of policy but, perhaps, not terribly crucial to the actual process of fact-finding. Respondent seriously questions if such general labels are of any significant utility whatever in the case of the fact-finding process by expert administrative law judges in a workers' compensation claim.

One need not go as far as one leading authority who questioned any need whatever for labels to measure human belief "for the law cannot expect to do what logic and psychology have not yet done." 9 Wigmore, *Evidence* (Chadbourne rev. 1981), page 415, Section 249.

However, the truth of Justice Harlan's observation must be accepted that labels on evidence such as "beyond a reasonable doubt" and "preponderance" are used to instruct the fact-finder as to the confidence society thinks he should have in his findings. In *Re Winship*, 397 U.S. 358 (1970) thus the labels put on burdens of persuasion represent society's judgement as to the importance of a policy underlying the issue, *Lavine v. Milne*, 424 U.S. 577 (1976); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Woodby v. INS*, cited above.

For example, in an FELA case the burden of going forward is "significantly different from the ordinary common-law negligence action", *Rogers v. Missouri Pacific Railway*, 352 U.S. 500, 509-510. As to social security cases it was stated:

> The extent of a claimant's burden of proof is primarily a matter of policy based upon experience . . . in this connection the Social Security

> Act, being remedial in nature, is generally construed liberally in favor of the claimant if any substantial basis exists for relief . . .

Paul v. Ribicoff, 206 F. Supp 606, 616(D) (Col. 1962) and:

> Courts and legislatures create presumptions for much the same reason as they assign burdens of proof . . . such reasons include: probability, procedural fairness, procedure economy, regularity, convenience, and the implementation of social policy.

Fishman, *Jones on Evidence*, 7th Edition, § 4.4.

Putting labels on burdens, such as "preponderance" on the evidentiary burdens factually, beyond expressing policy, are of little assistance to the fact-finder in actually resolving an individual case. Thus:

> It is a commonplace that in a given case the evidence may suffice or support a finding either way. The finding may be "against the weight of the evidence" and yet be supported by substantial evidence. The fact finder must make a choice based on its own appreciation of the greater probability.

Jaffey, Lewis L., *Administrative Law: Burden of Proof and Scope of Review*, 79 Harvard Law Review, 914, 915.

The terms, such as "preponderance" say little about analysis of the evidence. One authority stated that preponderance may mean one of three things: 1. The fact finder is satisfied that the fact more likely true than not true; 2. Greater weight of the evidence; 3. A combination of one and two, *Fishman*, Op. Cit., Section 3.9.

ALJ Silverman's analysis of the evidence and conclusions therefrom rather vividly illustrate all of these principles because one sees him carefully weighing all of the evidence, attempting to reconcile it, and eventually having to resolve it, not by any labels of evidence, but by the

common sense of the situation. This is precisely what administrator fact-finding is all about.

Labels such as "preponderance of the evidence" are necessary to instruct a jury but are not particularly helpful to an administrative law judge. The term "preponderance" means not only quantity and quality of the evidence but the fact-finder's appreciation of the evidence, e.g. credibility determinations. For example, in both of the involved cases there is a suggestion that the respective administrative law judges resolved the disputed medical testimony by giving preference to the reports of the claimant's attending physicians over those who had examined the claimant on only one occasion, or in the *Santoro* matter, only reviewed records (38a, 43-44a, JA42).[8] It is probably difficult for the fact-finder himself or herself to quantify such intangible factors as bearing upon the ultimate determination, and probably impossible for a reviewing court to do so. To a great extent, "preponderance" may well mean, in an administrative setting, what the fact-finder believes to be most fair and reasonable, provided only it is based upon a review and reflection of the entire administrative record. When Congressman Walter instructed the fact-finder to find "in accordance with the preponderance" (H.R. Rep. 1980, cited above) he was instructing the fact-finder to base the ultimate decision upon what he or she, based only on the

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[8] This respondent argued before the Third Circuit that a component of the principle of true doubt and a reasonable extension of the liberal purposes of the Longshore Act is that the testimony of the attending physician should be given preference over that of physicians who examined the claimant only once or never during his or her lifetime, (Brief of Respondent Santoro before Third Circuit, pages 26-32) this argument was ignored by the court.

administrative record, believed to be the proper conclusion.

If, however, a label be assigned and, as the above cases suggest it be done in part on policy, then the policy of the Acts herein would justify a label far less acceptable to the employers herein than the limited principle of doubt.

D. The principle of true doubt conforms with Congressional intention, the readings of the acts, does not violate the substantial rights of the parties and is required to implement the policies of the Acts.

Congress clearly recognized a general principle of true doubt as being part and parcel of the policy objectives of the respective Acts. In 1972 Congress put the BLBA within the broad provisions of the LHWC and in so doing stated:

> In the absence of the definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled minor or its survivors.

S. Rep. 743, 97th Cong., 2nd Sess., page 11 (1972).

Thus, the liberality extended not only to the basic entitlement provisions but to the actual fact-finding. In addition, it should be remembered that at this time Congress was undertaking a comprehensive revision of the Longshore and Harbor Workers' Compensation Act and the principle of true doubt had been a fixture of that statute for a long time. Yet, in amending the Longshore Act, Congress did not question the true doubt holdings, but rather grafted then wholly onto the BLBA. It cannot be disputed that Congress impliedly recognizes the principle of true doubt as a fixture of interpretation of the Longshore Act. In summary, the principle of true doubt had long been a part of the environment of Workers'

Compensation in 1972 so that Congress did not hesitate in utilizing that particular terminolgy when the BLBA was placed under the aegis of the LHWC.

The plain reading of Section 923(a) states that the fact-finder will be bound by formal rules neither of evidence nor procedure except as the Act provides. Yet, the Act itself lays down no burden of persuasion but directs the fact-finder to determine the "rights of the parties". That section further states that the rules of evidence to not apply "In making an investigation inquiry or conducting a hearing . . . ". Of the various functions performed by the deputy commissioner or the ALJ one would anticipate the questions of burden of persuasion would come into play only in the case of a hearing yet the statute prescribes the identical informality for all stages of the claim process. The fact that the 1972 amendments separated the administrative and adjudicative functions does not alter the plain reading of the statute and that plain reading does not set forth a specific burden of persuasion nor does it proscribe utilization of the true doubt rule. As above noted, Section 923(a) was taken almost verbatim from Section 113 of the New York Workers' Compensation Law. Contrary to the assertion of responded *Greenwich Collieries*, (Brf. pages 15-16) there is nothing new about the true doubt rule in its broad sense. As early as 1916 there was quoted a pamphlet entitled "German Workmen's Insurance as a Social Institution" by one Ludwig Lass in which it was stated of the world's first workers' compensation statute:

> In the interpretation of the laws and earnest endeavor is shown, above everything, to give material justice its due, while formal jurisprudence has to stand back. In cases where any legal provision is susceptible of several constructions, that interpretation is preferred when

> doubts arise, which corresponds to the intentions of the legislator from the social point of view. There is no anxious clinging to the dead letter; on the contrary, the interpretation is liberal and in keeping with the spirit of the legislation . . .
>
> Further, mention must be made of the fact that in workmen's insurance matters, not the same severe standard is applied by the Imperial Insurance Office to proof, as is customary for disputes in common-law. Thus, proof of probability is often considered sufficient . . . *A similar view is taken by jurisdiction in the numerous doubtful cases where the accident itself, or the connection between the injury or death of an injured person and the accident, cannot be sufficiently proved.* [emphasis applied]

quoted, *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 443-444 (1916) (dissenting opinion).

The principle of true doubt is a function not only of legislative intent and liberal interpretation but of the relaxation of common-law standards explicitly incorporated into Section 923(a), including a less stringent than common-law burden of persuasion. The stated concern of the employers-respondents herein is that the principle of true doubt would lead to decisions based upon policy, not evidence; of decisions going against the weight of the evidence. This is not the case. The principle of true doubt in no way violates rights of the employer. In fact, the employer-petitioner's real argument is with the underlying liberal purpose of the respective Acts.

Both 923(a) of the LHWC and Section 7(c) of the APA do not identify the party having the burden of persuasion. Whatever may be the standard of evidence, it is even-handedly applied to both parties, the goal being to

"best ascertain the rights of the *parties*" [emphasis supplied] § 923(a). Congress tells us that the third Section of 7(c) has the identical provision:

> Similarly the requirement that no sanction be imposed or rule or to be issued except upon evidence of the kind specified means that the proponent of a denial of relief must sustain such denial by that kind of evidence.

H.R. Rep. (1980), cited above, page 37.

The Third Circuit's attempt to read this expression of intent out of existence, asserting that it is impossible for both parties to have the burden of persuasion on the same issue at the same time is unpersasive (JA18-19). The employer does enter the ALJs courtroom on a level playing field with the claimant as both alike are relieved of common-law rules of evidence or procedure. If the claimant can prevail on his case by less than a common-law standard of proof then so can the employer.

Section 7(c) mandates a decision based upon the entire record "in accordance with the reliable, probative, and substantial evidence." As the same evidentiary standard applies to both parties, that statutory description, to a great degree, describes the evidence that the finder of fact, in his discretion, accepts as the more reasonable.

In the usual case, the claimant generally is the "proponent of a rule or order" (sentence 1, Section 7(c) and has the burden of producing evidence so as to make out a prima facia case. If the claimant does not make out a prima facie case then the ALJ may rule against the claimant even if the employer produces no evidence. However, the employer generally will introduce contrary evidence and the fact-finder must arrive at his decision "on consideration of the whole record" and "in accordance" with the evidence, APA Section 7(c).

In some cases the claimant's evidence will be found more persuasive and a decision will result in favor of the claimant. In other cases, the employer's evidence will be found clearly more persuasive in which case a decision will issue in favor of the employer. The principle of true doubt has nothing whatever to do with the Administrative fact-finding process to this point. It is equally important to emphasize that to this point there is no difference whatever on the burdens of either the claimant or the employer.

It is only when the ALJ, having carefully weighed all of the evidence, is doubtful about the ultimate factual determination that the principle of true doubt comes into play. The respondent has some difficulty with using the concept of the evidence being "in equipoise". It may perhaps be in the very nature of doubt that at some point and in some ways the ALJ will find the claimant's evidence more persuasive and at other times and indifferent ways the employer's evidence more persuasive. He may be uncertain as to the weight of the respective evidence or maybe uncertain as to the manner in which intangibles such as credibility or the financial interest of witnesses should be applied to the weight of the evidence.

In the case of such doubt, the principle of true doubt permits the ALJ to find in favor of the injured employee and his or her family, based upon a strongly expressed legislative intent and social policy. Under the Director's formulation, in that still more rare case where the administrative law judge finds the evidence to be precisely in equipoise, then a decision is mandated in favor of the claimant. The true doubt rule, as a general proposition, permits but does not require a finding in favor of the injured employee and his or her family. In other words, no reviewing body can force the administrative law judge

to utilize the principle of doubt to change the outcome of a case, where he or she has found that the evidence justifies a finding in favor of the employer, *Sprague v. SEC*, cited above; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993). Utilization of the principle lies within the sound discretion of the fact-finder and is not subject to judicial review. The same reasoning would apply, even where a determination would be issued against the claimant and such decision were against the manifest weight of the evidence. The limitations on judicial review exist even-handedly in behalf of the claimant and the employer.

The reviewing judicial body can do no more than require that the Administrative Decision be rational, supported by substantial evidence, and in accordance with law, *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, cited above. As to the standard of fact-finding, this is no more than declarative of both 7(c)'s and 10(e) of the APA. If an administrative law judge in a Workers' Compensation case were unwise enough to state that he is finding for the claimant even though he does not believe the claimant's evidence or even though he finds the employer's evidence more persuasive and is doing so because the relevant Act should be liberally construed in favor of the claimant (unlikely as such a statement is) then that decision could not withstand judicial review because it would be both irrational and not supported by substantial evidence (the latter because evidence was not the basis of the decision). By the same token, judicial review would overturn a decision wherein an Administrative Law Judge said he or she was finding a given way, not because of the appreciation of the evidence, but

because the ultimate factual determination was supported, not by what is believed to be the proper inference, but by more than a scintilla of evidence, i.e. substantial evidence.

Boiled down to essentials, it is the duty of an administrative law judge in proceedings under the respective Acts to make a decision based upon his or her conscientious appreciation of what is the appropriate finding. Such determination must be based solely upon the evidence of record and the fact-finder must believe the evidence in favor of his or her finding is at least as probable as the opposing evidence. The principle of true doubt, broadly stated, does no more than permit the administrative law judge, in a close case, to take into account the liberal policies of the respective Acts. It is indeed a most humble expression of such a strong judicial and legislative policy stated over so many years. There is little question that both of the decisions herein would not have gone either to the Third Circuit or this court if the ALJ had simply been silent aboout his or her doubt about the decision and simply stated conclusions. Is it rational to invalidate the decision because of expressed doubt about the ultimate finding? It is suggested not.

It is at least intimated by both employers-respondents that the involved programs are of extreme liberality and expense (*Greenwich* Brief, page 15; *Maher* Brief, pages 29-30) and further that the claimant and employer are in an equal financial position to produce evidence (*Greenwich* Brief, note 10, page 15).

There is no question that workers' compensation benefits can be a substantial expense to the employer but these payments do not approach what the employer would have to pay had employees retained their right of common-law or admiralty suits againsts the employer nor does it restore to

the employees what they would have earned but for the injury or death. The real argument of the employers herein truly is with the liberal interpretation of the respective Acts. They seek to reimpose upon the injured employee and his family the obligations of a common-law plaintiff without the corresponding opportunity to realize substantial damages.

It is, perhaps, not for this Court to determine whether or not the practice of ajudication of cases is slanted for or against the injured employee. Congress and the agencies respectively are, in a better position to do such investigations.

However, the following figures may be of some relevence. The Benefits Review Board Service "Longshore Reporter" (Matthew Bender), reports selected decisions of Administrative Law Judges as to the LHWC and extensions, but NCT the BLBA. Volume 24 through 27 cover a period from approximately June, 1990 to December, 1993. Review of those decisions in which there were presented an issue between the claimant and the employer reveals that the following percentages of claims were denied in their entirety (as opposed to being granted in whole or in part): Volume 24: 35%, Volume 25: 53%, Volume 26: 55%, and Volume 27: 47%. The limitations of statistics are readily accepted and it is not claimed that these figures are necessarily typical of all claims. However, these figures do demonstrate fairly convincingly that the Longshore program, at least, is not one of runaway liberality or the equivalent of a major medical insurance program.

The inescapable fact is that there is a great economic inbalance between the injured employee and his family as against an employer or insurance carrier. As these cases so vividly illustrates employers have the financial resources to utilize the services of well qualified specialists, who may or

may not be professional witnesses and obtain a great quantity of evidence. In both of these cases, the claimants relied on the testimony of their own attending physician. These attending physicians may not be of qualifications and background equal to the physicians produced by the employers because the claimants even before they became disabled, may not have been in a social-economic class to utilize such physicians. Assuredly, with enough money, the injured employee can obtain a consultation with a very well qualified physician, can (in a BLBA case) obtain any number of x-rays and pulmonary function tests equal to the number produced by the employer. However, in a typical case the employee is disabled and does not have the funds to do so. Perhaps it is suggested, then, that the claimant's attorney should pay the expense for, if the claimant prevails in contested case then the attorney can recoup these expenses from the employer, 928(a). However, the attorney in a longshore case must confront the ethical constraints against financing litigation. The Canons of Professional Responsibility permit advancement of such costs only when the client remains ultimately responsible for them, DR 5-103, quoted McKinney's Consolidated Laws of New York, Judiciary Law. Factually, the claimant's representative is often required to make do with whatever medical evidence the injured employee has accumulated in the course of treatment.

Administrative law judges in cases under the Longshore Act and the BLBA, who deal with such cases on a day-to-day basis understand the realities of the situation involving, because of the economic imbalance between the injured employee and the employer and the resulting desparity in the ability to produce evidence, that it is the true doubt rule that creates a level "playing field" between the employer and employee. On a practical level, the principle of true doubt,

especially in a context of a conflicting medical testimony, is badly needed by the injured employee and his family.

CONCLUSION

The decisions of the United States Court of Appeals for the Third Circuit in both cases should be reversed and the decisions of the Benefits Review Board in both cases reinstated.

Respectfully submitted,

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ISRAEL, ADLER, RONCA &
GUCCIARDO

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